IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 162 of 1993

For Approval and Signature:

THE HON'BLE MR.JUSTICE D.A.MEHTA
HON'BLE MS.JUSTICE H.N.DEVANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 of any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Petitioner(s)

Versus

ALEMBIC GLASS INDUSTRIES LTD. - Respondent(s)

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Appearance :

MR MANISH R BHATT for Petitioner No(s).: 1.

MRS SWATI SOPARKAR for Respondent No(s).: 1.

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CORAM :THE HON'BLE MR.JUSTICE D.A.MEHTA

HON'BLE MS.JUSTICE H.N.DEVANI

Date : 17/06/2005

ORAL JUDGMENT

(Per : THE HON'BLE MR.JUSTICE D.A.MEHTA)

1. The following two questions have been referred by the Income Tax Appellate Tribunal, Ahmedabad Bench “B”, under Section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of Commissioner of Income Tax, Baroda, for the opinion of this Court :

1. Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the amount of leave salary paid to the retiring employees did not not constitute salary as defined in Explanation 2 to Section 40A(5) for the purpose of limiting the expenditure under that section ?
2. Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the amount of statutory liability of Sales-Tax, E.S.I. Contribution, P.F. Contribution etc. paid after the close of the previous year but before the due date for filing of return of income u/s 139(1) of the Act was an allowable deduction in A.Y. 1984-85 when the proviso to section 43B was inserted with effect from 1.4.1988 ?”

1. Assessment Year is 1984-85 and the relevant accounting period is calender year 1983. The assessee, a Limited Company, filed its return of income on 30-7-1984. It appears that, from the balance sheet accompanying the return, the assessing officer discovered that there were various statutory liabilities which were unpaid at the end of the relevant accounting period, though the said statutory liabilities were discharged in the subsequent accounting period before the return of income was filed under section 139(1) of the Act. Accordingly, the assessing officer disallowed a total sum of Rs.22,50,095/- under Section 43B of the Act. The assessee succeeded both before the CIT (Appeals) and the Tribunal.
2. It is common ground between the parties that question No.2 which arises with reference to the aforesaid disallowance stands covered and answered by a decision in the case of Allied Motors [P] Ltd. v. Commissioner of Income Tax, [1997] 224 ITR 677 (SC). Hence, it is not necessary to set out the facts and contentions in detail. Applying the ratio of the aforesaid decision in the case of Allied Motor Pvt. Ltd. rendered by the Apex Court, it is held that, in so far as question No.2 is concerned, the Tribunal was right in law in holding that various statutory liabilities discharged after the close of the previous year, but before the due date for filing return of income under Section 139(1) of the Act, was an allowable deduction. Question No.2 is accordingly answered in the affirmative i.e in favour of the assessee and against the revenue.
3. In so far as the question No.1 is concerned, the facts are that the assessee had disallowed a total sum of Rs.1,58,947/- under Section 40A(5) of the Act. A sum of Rs.50,857/- was further disallowed by the Assessing Officer under section 40A(5) of the Act. This amount of Rs.50,857/- was paid by the assessee company to three of its employees at the time of their retirement on account of leave salary. The Assessing Officer disallowed the claim holding that Section 10(10AA) of the Act which exempted such payment from inclusion in the total income was relatable to individual recepient employee and had no bearing while working out the disallowable limit under Section 40A(5) of the Act in hands of the employer.
4. The assessee carried the matter in appeal before the CIT (Appeals) and succeeded. The CIT (Appeals) followed the decision of Income Tax Appellate Tribunal, Bombay Bench (Special

Bench) in the case of Kodak Limits V/s I.A.C. (though citation as recorded in the order of Tribunal shows that the said decision is reported at 18 ITD 213, the correct citation of the report is Volume 3 of Selected Orders of ITAT 517). The Tribunal has confirmed this decision of CIT (Appeals).

5. Assailing the order of the Tribunal, Mr.M.R.Bhatt, the learned Senior Standing Counsel for revenue submitted that the CIT (Appeals) and the Tribunal have wrongly read provisions of section 40A(5) of the Act with special reference to the definition of “salary” in Explanation 2 to said sub-section. Elaborating on this, it was submitted that “salary” has the same meaning assigned to it as defined in section 17(1) read with Section 17(3) of the Act. That as per Section 17(1)(va), any payment received by an employee in respect of any period of leave not availed of by the employee is included in the definition of “salary” and hence, for the purposes of determining the limit under sub-section (5) of Section 40A of the Act, such amount of leave salary paid to an employee had to be included. That such payment would fulfill the conditions stipulated in Section 40A(5)(a)(i) of the Act. In other words, such payment would be incurring of any expenditure by the assessee resulting directly or indirectly in the payment of any salary either to an employee or a former employee. According to Mr.Bhatt, the only items of expenditure which could be excluded were specified by the legislature as per second proviso under Section 40A(5)(a) of the Act. He, therefore, urged that, as leave salary falling within the provisions of section 10(10AA) of the Act has not been enumerated in second proviso, such payment cannot be excluded and the Tribunal's order was, therefore, erroneous in law. In support of the submissions, he referred to decision of Calcutta High Court in the case of Indian Oxygen Ltd. v. Commissioner of Income Tax, [1987] 164 ITR 466 and emphasized the fact that the disallowance under Section 40A(5) of the Act was required to be made in hands of the employer, who was the payer, and any treatment of the amount in the hands of the employee had no relevance.
6. Mrs.Swati Soparkar, the learned counsel appearing on behalf of respondent assessee submitted that, as held by Special Bench of the Tribunal, the items namely, leave salary and gratuity are similar in nature, as both are paid normally at the time of retirement and hence, on parity of reasoning, the decision of Special Bench which pertains to applicability or otherwise of Section 40A(5) of the Act, was rightly applied by the Tribunal holding that disallowance of such payment cannot be made and no interference was called for in the decision of the Tribunal.
7. Section 40A(1) of the Act stipulates that provisions of the section shall have effect notwithstanding anything to the contrary contained in any other provision of the Act relating to computation of income under the head “profits and gains of business or profession”. Sub-section (5) pertains to an assessee where the assessee incurs any expenditure which results directly or indirectly in payment of any salary and / or perquisite to an employee or a former employee. If any of the conditions laid down in sub-clause (i) or (ii) of clause (a) stands fulfilled, then subject to clause (b), so much of such expenditure as may exceed the limits specified in clause [c] is not to be allowed as a deduction. Under the second proviso, the following four items are not to be taken into account while working out aggregate of the expenditure in sub-clause (i) of clause (a) of Section 40A(5) of the Act :

“(i) the value of any travel concession or assistance referred to in clause (5) of section 10;

1. passage moneys or the value of any free or concessional passage referred to in sub-clause (i) of clause (6) of section 10;
2. any payment referred to in clause (iv) or clause (v) of sub-section (1) of section 36;
3. any expenditure referred to in clause (ix) of sub-section (1) of section 36.”

1. Explanation 2 to sub-section (5) states that, for the purposes of Section 40A(5) of the Act, “salary” would have the same meaning as assigned to it under Section 17(1) read with Section 17(3) of the Act, subject to the specified modifications. It is an admitted position that the said modifications are not relevant for the present.
2. Section 17(1)(va) of the Act states that “salary” would include any payment received by an employee in respect of any period of leave not availed of by the employee. Section 17(1)(iv) states that any fees, commissions, perquisites or profits in lieu of or in addition to any salary or wages, shall be included in “salary”. The phrase “profits in lieu of salary” is defined by an inclusive definition under Section 17(3) of the Act. Under sub-clause (i) of clause (3), an amount of any compensation due or received by an assessee from his employer or former employer at or in connection with termination of employment, or modification of the terms and conditions of employment, is included. Similarly, under sub-clause (ii), any payment (other than payments specified in parenthesis) due to or received by an assessee from an employer or a former employer or from a provident fund or other fund etc. are also to be included as profits in lieu of salary. It is pertinent to note that, under sub-clause (ii), the payment of leave salary referred to in Section 10(10AA) of the Act does not form part of the various payments referred to in the parenthesis.
3. Thus, on a plain reading, it appears that payment of leave salary is specifically included in the definition of “salary” directly by virtue of Section 17(1)(va), and indirectly when one considers provisions of Section 17(3)(ii) of the Act. Therefore, once such payment falls within “salary” by virtue of Explanation 2 to Section 40A(5) of the Act, it would be apparent that the same will have to be taken into consideration for the purposes of determination of the limit specified in clause [c] of sub-section (5) of Section 40A of the Act, because the same is definitely an expenditure which results directly or indirectly in the payment of salary to an employee or a former employee. The said payment is not excluded even by terms of second proviso to clause (a) of sub-section (5) of Section 40A of the Act. Admittedly, the payment is by the employer and the employer is the assessee in the present case. Therefore, while computing the income under the head “profits and gains of business or profession”, such expenditure is not deductible subject to the specified limit.
4. Section 10 in the opening portion states that, in computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included. In other words, the various types of incomes specified in the different clauses in Section 10 are incomes which do not form part of total income. Clause (10AA) refers to any payment received by an employee of the Central Government or State Government or any employee, other than an employee of the Central Government or State government, and such payment is the cash

equivalent of the leave salary in respect of the period of earned leave at the credit of the employee at the time of retirement, whether on superannuation or otherwise. Therefore, it is apparent that the said provision can come into play only in hands of the recepient employee. Such payment is not included in the total income while computing the total income of the receipent employee. The said provision, therefore, cannot be projected while computing the income under the head “profits and gains of business or profession” in the hands of the employer when limit of disallowable expenditure is to be worked out, under Section 40A(5) of the Act. As already noticed hereinbefore, Section 10(10AA) of the Act does not fall within Section 17(3)(ii) of the Act, nor does it find place in the second proviso under Section 40A(5)(a) of the Act. In the circumstances, the conclusion of the Tribunal is not supported by the provisions of law.

5. The learned Senior Standing Counsel for the applicant revenue has placed on record Special Bench decision in case of IAC v. Kodak Ltd. rendered on 28th April 1981 in light of the fact that both CIT (Appeals) and the Tribunal have adopted the reasoning and ratio of the said decision while deciding the present case. On going through the said decision, it becomes apparent that the Special Bench was called upon to decide whether gratuity or any lumpsum payments which are not in the nature of periodical payments for services rendered would fall within the phrase “any salary” while determining the limit of admissible expenditure under Section 40A(5) (c) of the Act. After extensively referring to provisions of Section 17(1) read with Section 17(3)(ii) of the Act, it is held that the term “any gratuity” in Section 17(1)(iii) of the Act does not include or contemplate retirement gratuity payable on termination of employment. The Special Bench has, for this purpose, taken recourse to provisions of section 17(3)(ii) of the Act, with special reference to the payments mentioned in the bracketed portion. However, simultaneously, the Special Bench of the Tribunal has opined that only the retirement gratuity to the extent specified in Section 10(10) of the Act is to be excluded from the definition of “salary” for the purposes of computing the limit of disallowance under Section 40A(5) of the Act. In other words, even retirement gratuity beyond the limit specified in section 10(10) of the Act is to be included while computing the disallowance in hands of the employer under section 40A(5) of the Act.
6. On the basis of the aforesaid decision, the Tribunal in the present case has equated “gratuity” with “leave salary” by holding that both the payments are of the same nature as they are paid on or at the time of retirement. However, the Tribunal has lost sight of the fact that Special Bench decision does not per se exclude “gratuity” from the definition of “salary”; nor is the decision rendered on the footing that all payments made at the time of retirement are to be excluded. In the result, reliance on the Special Bench decision by the CIT (Appeals) and the Tribunal in the present case is unwarranted and the said decision cannot support the stand of the assessee. The position in law is well settled. Once there is a specific provision relating to a specific item, it is not possible to extend the same in relation to any other item not provided by the legislature in the said provision. No intendment is permissible. The authority / Tribunal or the Court cannot incorporate a provision for granting relief when the context denotes the legislative intent to be otherwise. The existing provision has to be read and applied. The orders of CIT (Appeals) and the Tribunal are, thus, not sustainable in law.

7. It may be noted that, in the case of Commissioner of Income Tax v. Citibank N.A., [2003} 264 ITR 18, Bombay High Court has taken a similar view.
8. Therefore, on the facts and in the circumstances of the case, the Tribunal was not justified in law in holding that the payment of “leave salary” to the retiring employees did not constitute “salary” as defined in Explanation 2 to Section 40A(5) of the Act for the purpose of limiting the expenditure under that section. Accordingly, question No.1 is answered in the negative i.e in favour of the revenue and against the assessee.
9. Reference stands disposed of accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[H.N.DEVANI, J.]

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